LIBRARY
SUPREME COURT, U. S.

FILED
AUG 24 1967
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 534

CARMEN BENCOMO

Petitioner,

v.

WILL C. BENCOMO

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA.

DANIEL L. GINSBERG
and
HAROLD UNGERLEIDER
420 Lincoln Road
Miami Beach, Florida 33139
Counsel for Petitioner

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Constitutional and Statutory Provisions Involved	2
Statement	2
Reasons for granting the writ	4
Conclusion	10
Appendix A — Opinion below	App. 1
B — Order of Dismissal	App. 14
C — Constitutional Provisions and Statutes	App. 16

CITATIONS

Cases: Page

Alexander v. Alexander, 140 F. Supp. 925, (W.D.So. Car. 1956) 6

Alexander v. Alexander, 229 F.2d 111 (4th Cir. 1955) 6

Alexander v. Alexander (U.S.D.C. 1956), 140 F. Supp. 925 ..... App. 12

Amendola v. Amendola, Fla. App. 1960, 121 So.2d 805; and see 43 ALR 2nd 632 ..... App. 6

Bencomo v. Bencomo, 199 So2d (Fla. 1967) 5

Brown v. Brown, (1914), 88 Conn. 42,89 Atl. 889 ..... App. 10

Brown v. Gosser (Ky. 1953), 262 S.W. 2d 480 ..... App. 10

Bushnell v. Bushnell (1925), 103 Conn. 583, 131 Atl. 432 ..... App. 10

Combs v. Combs, (Ky. 1953), 262 S.W. 2d 821 ..... App. 10

Corren v. Corren, Fla. 1950, 47 So.2d 774 ..... App. 3

Courtney v. Courtney (1938), 184 Okla. 305, 87 P. 2d 660 ..... App. 11

Damm v. Elyria Lodge No. 465 (1952) 158 Ohio St. 107, 107 N.E. 2d 337 ..... App. 11

Denton v. Denton (1931), 223 Ala. 282, 135 So. 481 ..... App. 10

Ennis v. Truhitte, 306 S.W. 2d 549 (Mo. App. 1957) 9

CITATIONS (Cont.)

Cases: Page

Fiedler v. Fiedler (1914) 42 Okla. 24, 140 P. 1042 ..... App. 11

Fitzmaurice v. Fitzmaurice, 62 N.D. 191, 242 N.W. 526 ..... App. 11

Fontaine v. Fontaine, (1931) 205 Wis. 570, 238 N.W. 40 ..... App. 11

Forbes v. Forbes (1938), 226 Wis. 225, 271 N.W. 112 ..... App. 11

Gilman v. Gilman (1915), 78 N.H. 4, 95 Atl. 657 ..... App. 10

Ginsberg v. Ginsberg, 126 Conn. 146, 9 A. 2d 812 ..... App. 10

Goode v. Martinis, 58 Wash. 2d 229, 361 P.2d 941 (1961) 7

Gremillion v. Caffey (La.), 71 So. 2d 670 ..... App. 12

Harris v. Harris (1924), 211 Ala. 222, 100 So. 333 ..... App. 10

Jacobsen v. Massachusetts, 197 U.S. 11 (1905) 7

Jaeger v. Jaeger (1952), 262 Wis. 14, 53 N.W. 2d 740 ..... App. 11

Johnson v. Johnson (1917) 201 Ala. 41, 77 So. 335, 6 A.L.R. 1031 ..... App. 10

Kaczorowski v. Kalkosinski, 321 Pa.438, 184 Atl.663 (1936) ..... App. 9

CITATIONS (Cont.)

Cases: Page

Katzenberg v. Katzenberg, 183 Ark. 626, 37 S.W. 2d 696 ..... App. 10

Leach v. Leach (1957), 227 Ark. 599, 300 S.W. 2d 15 ..... App. 10

Long v. Landy, 35 N.J. 44, 171 A.2d 1 (1961) 9

Lorang v. Hays (1949), 69 Idaho 440, 209 P.2d 733 ..... App. 10

Lumbermen's Mut. Cas. Co. v. Blake (1946), 94 N.H. 141, 47 A. 2d 874 ..... App. 10, 11

Oschiek v. Oschiek, 224 S.C. 249, 136 S.E. 2d 393 ..... App. 11

Pardue v. Pardue (1932), 167 S.C. 129, 166 S.E. 101 ..... App. 11

Pridelle v. Farm Bureau Mut. Ins. Co. (N.H.), 119 A. 2d 97 ..... App. 11

Rains v. Rains (1935), 97 Colo. 19, 46 P.2d 740 ..... App. 10

Robinson's Administrator v. Robinson, 188 Ky. 49, 229 S.W. 1074 (1920) 9

Sanchez v. Olivarez, 226 A. 2d 752 (1967) 8

Scotvold v. Scotvold (1941), 68 S.D. 53, 208 N.W. 266 ..... App. 11

Skinner v. Oklahoma, 316 U.S. 535 (1942) 7

Steele v. Steele (D.D.C. 1946), 65 F. Supp. 329 ..... App. 12

CITATIONS (Cont.)

Cases: Page

Taylor v. Dorsey, 155 Fla. 305, 19 So. 2d 876, 880 ..... App. 3

Thompson v. Thompson, 218 U.S. 611 (1910) 9

Statutes:

U.S. Const. Amend. IV, V, XIV ..... App. 16, 17

Fla. Const. Declaration of Rights Sec. 1, 4, 12 ..... App. 17, 18

Fla. Statutes, Sec. 708.08, Married women's rights, separate property ..... App. 18

Fla. Statutes, Sec. 708.09, Same; agreements with husband, power of attorney, etc. ..... App. 18, 19

Fla. Statutes, Sec. 2.01, Common law and certain statutes declared in force ..... App. 19

1 U.S.C. Sec 1 ..... App. 19

Text:

27 Am. Jur. Husband and wife, Sec. 589, 594 ..... App. 6

Prosser on Torts, 3rd Ed. pp. 879-883 ..... App. 8

Harper and James on Torts, Vol. 1, 1956, Sec. 8.10, pages 645, 646 ..... App. 11

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. _____

CARMEN BENCOMO

Petitioner,

v.

WILL C. BENCOMO

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA.

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Florida entered in the above styled cause on May 31, 1967.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of Florida was reported in 200 So2d 171 (Appendix A).

JURISDICTION

The jurisdiction of this Court is invoked under 28 USC Sec. 1257 (3) in that a right is claimed under the 14th Amendment of the Constitution of the United States.

QUESTION PRESENTED:

Where a State Court denies a divorced spouse a right of action and appropriate remedy against her former husband for an intentional tort committed by him during coverture, does this amount to a deprivation of due process and equal protection under the Fourteenth Amendment of the United States Constitution?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED:

The following provisions of the United States Constitution and relevant Statutes are set forth in Appendix C as follows:

Florida Statutes Sec. 2.01; 708.09; 708.09
Constitution of Florida, Declaration of Rights
Sections 1, 4 and 12
Florida Constitution Article XI Sec. 1
28 U.S.C. Sec. 1257 (3)
1 U.S.C. Sec. 1
United States Constitution, Amendment IV
United States Constitution, Amendment V
United States Constitution, Amendment XIV Sec. 1

STATEMENT OF THE CASE:

The Petitioner filed a Complaint in the Circuit Court of the 11th Judicial Circuit in and for Dade County, Florida, (R1-14) seeking damages for an intentional tort inflicted during coverture by her former husband. The Respondent, upon learning that his wife (Petitioner) had filed suit for divorce conceived a plan to have her declared

mentally incompetent and have himself appointed Guardian of property in which she had a beneficial interest. In furtherness of this scheme, and through the assistance and cooperation of a doctor, he obtained, for a fee paid by the husband, a letter from the doctor indicating that she needed a psychiatric examination. The Doctor, a general practitioner, not a psychiatrist, had not seen the Petitioner professionally for over ten years, at which time he treated her for a chest cough. The husband initiated incompetency proceedings charging his wife with "paranoia" and a "persecution complex", and requested that she be taken for medical observation and treatment. Pursuant to the aforesaid affidavit, an order of detention was issued by the County Judge having jurisdiction of the proceedings resulting in the Petitioner being compelled to undergo medical examinations and observations by doctors appointed by the County Judge. After such examinations and observations, a hearing was held and the Petitioner was discharged on the ground that she was not mentally incompetent. The Petitioner's Complaint alleged that this was a false and malicious conspiracy, plan and scheme on the part of her husband, with the doctor, to have the husband appointed as her guardian and thus secure control of her property and thwart her divorce;—(Under Florida Law, an incompetent person cannot sue or be sued for divorce)—although they knew she was of sound mind and mentally competent; that these actions on the part of the husband were intentional, wrongful, false, reckless, malicious and wanton and resulted in great injury to her, her reputation and character; and that she suffered serious emotional and mental anguish. It was also alleged that she was required to expend significant sums of money for medical attention as well as costs, and counsel fees in defending herself against the charges of incompetency; and

that she had a right of action under the Fifth and Fourteenth Amendment of the United States Constitution; the First, Fourth and Twelfth Sections of the Declaration of Rights of the Constitution of Florida as well as Article XI Sec. 1 of the Florida Constitution and Section 2.01, 708.08, 708.09, of the Florida Statutes. She prayed for compensatory as well as punitive damages.

The Respondent filed a Motion to Dismiss the Amended Complaint on the ground of interspousal immunity from tort actions (R 15).

The trial Court entered an order of dismissal (R16) in which it construed Sections 1, 4 and 12 of the Declaration of Rights of the Florida Constitution, Article XI Sec. 1 of the Florida Constitution, the 5th and 14th Amendments to the United States Constitution and Section 708.08 and 708.09 and 2.01 of the Florida Statutes as not including the right of an ex-wife to sue her former husband for intentional tort committed upon her during coverture and upon such conclusion dismissed the Complaint with prejudice.

A direct appeal was taken to the Florida Supreme Court pursuant to Article V Sec 4 (2) of the Florida Constitution (R. 17). In a 6 to 1 decision, the Florida Supreme Court affirmed the decision of the Lower Court (App. A).

ARGUMENT AND REASONS FOR GRANTING THE WRIT:

1. The present case raises important questions of Fourteenth Amendment due process and equal protection relating to the rights of a married woman granted to her

as a "person" under the U.S. Constitution. The decision of the Florida Supreme Court is predicated on an unconstitutional doctrine. The Court held that the interspousal immunity doctrine precludes tort actions by one spouse against the other because "this court has long been committed to the proposition that one spouse cannot sue the other because, under the common law, they are one person." **BENCOMO v. BENCOMO, 200 So2d** (Fla 1967). Not only the Constitution of the United States in the use of the word "person" includes all individuals, but the laws of the United States make the same provisions by providing that; in construing the Statutes of the United States, words importing the masculine gender include the feminine, as well... The words "person" * include * individuals 1 U.S.C. Sec. 1. The Constitution itself is replete with references to "person" without discriminating between single and married persons. The Fourteenth Amendment, Sec. 1 provides that "All **persons**, born or naturalized * nor shall any state deprive any **person** of life, liberty or property without due process of law; nor deny to any **person** within its jurisdiction the equal protection of the laws".

Section 3 starts off: "no **person** shall *

The Fourth Amendment provides that "the right of the people to be secure in their **persons** *

Amendment Five states that "no **person** shall be held to answer for a capital or otherwise infamous crime... nor shall any **person** be subject for the same offense to be twice put in jeopardy... nor be deprived of life, liberty or property, without due process of law..."

Numerous other sections of the Constitution make reference to person, people or citizen without discriminating against married women. Therefore, it is patently clear that the intent of the adopters of the Constitution was to include married women within the word "person".

The Florida Supreme Court by holding that a married woman is not a person for purposes of an intentional tort suit between divorced spouses, has ruled contrary to and in direct violation of the United States Constitution.

2. The Florida Supreme Court's denial of Petitioner's right to maintain a tort action was a denial of due process of law in contravention of the Fourteenth Amendment. The Court's decision is in conflict with **ALEXANDER v. ALEXANDER**, 140 F. Supp. 925, (W.D. So. Car. 1956) where, under a parallel factual situation, the Federal District Court applied Florida Law and found that "the common law of Florida has been abrogated by the Fourteenth Amendment to the United States Constitution, and by the Constitution of the State of Florida . . ." **Id** at 927. The defendant appealed from the judgment for the Plaintiff, and the United States Circuit Court of Appeal for the Fourth Circuit held that the evidence of the Plaintiff was sufficient to create a jury issue. **ALEXANDER v. ALEXANDER** 229 F.2d 111 (4th Cir. 1955). The Petitioner submits that there is no significant factual or legal distinction between **Alexander** and the case herein.

3. The Florida Supreme Court's refusal to allow a divorced spouse the right to sue her former husband for an intentional tort committed during coverture was a denial of equal protection under the Fourteenth Amendment which provides in part:

> ...nor shall any State...deny to any person within its jurisdiction the equal protection of the laws.

The test set forth by this Court in determining whether a state has denied its citizens equal protection is predicated on the rational basis upon which the State bases its action. **JACOBSEN** v. **MASSACHUSETTS**, 197 U.S. 11 (1905). If there has been an arbitrary or irrational classification by the state, such action has been held to be violative of the equal protection clause of the Fourteenth Amendment. **SKINNER** v. **OKLAHOMA**, 316 U.S. 535 (1942). It is recognized by a number of jurisdictions, that when the spouses have been divorced and the marital relationship ceases to exist, there is no rational basis for disallowing a tort action between the former spouses. To deny a divorced spouse a right of action is to arbitrarily discriminate against her because of her former marriage. The decision of the Court below contravenes the equal protection clause of the Fourteenth Amendment.

4. While the jurisdictions are admittedly in conflict, a number of states have recognized the unconstitutionality of the interspousal immunity doctrine. These courts have afforded due process and equal protection guarantees by allowing tort actions where the policy reasons for the doctrine can no longer be substantiated. The policy reasons supporting the immunity theory become academic after the parties have been divorced. The Washington Supreme Court's rationale in **GOODE** v. **MARTINIS**, 58 Wash.2d 229, 361 P.2d 941 (1961), expressed the logic of the position:

> Where at the time of the tort the marital relationship of the parties has completely lost its original character and the parties have taken concrete legal steps to dissolve the marital relationship together, we can perceive of no convincing reason for depriving an injured spouse of his or her cause of action. Id. at 945.

The language of the Court is directly on point with the instant case. The respondent's intentional and malicious acts were perpetrated after the respondent learned that the Petitioner had filed suit for divorce, and his acts were designed to frustrate the divorce action. If a rational basis exists at all for the application of the interspousal immunity doctrine, it certainly disappears after the marital relationship has lost its character and domestic tranquillity has ceased to exist.

In Sanchez v. Olivarez, 226 A.2d 752 (1967) the Superior Court of New Jersey was called upon to decide the issue of whether a divorce decree revives and warrants a created right in the former wife to prosecute an action in negligence for a tort which occurred during coverture. The Court in upholding the former wife's action, acknowledged the fact that New Jersey adheres to the interspousal immunity doctrine, but stated that:

> Obviously, the status of marriage is the key premise for arriving at a logical conclusion. Such status being required to establish interspousal immunity, if there is no status, then there can be no immunity. Id. at 754.

This position is supported by a legion of authority which indicates that where death has ended the marital relationship, the policy considerations supporting the immunity doctrine lose their validity. E.g., **KACZOROWSKI v. KALKOSINSKI**, 321 Pa. 438, 184 Atl. 663 (1936); **ROBINSON'S ADMINISTRATOR v. ROBINSON**, 188 Ky. 49, 229 S.W. 1074 (1920); **LONG v. LANDY**, 35 N.J. 44, 171 A.2d 1 (1961); **ENNIS v. TRUHITTE**, 306 S.W. 2d 549 (Mo. App. 1957).

5. The anomalous and discriminatory situation of considering the wife and husband as one person has not gone unrecognized by the state legislatures. Over the past one hundred years, the state legislatures, under the pressure of social and economical progress, have enacted Married Women's Emancipation Acts. The purpose of these acts was to relieve the married women of the unconstitutional disabilities of coverture and allow them to independently hold property and sue and be sued in their own name. However, the majority of these statutes are silent as to whether the specific act will allow an interspousal tort action but it is manifestly clear from the construction of the word "person" in the United States Constitution, that the intent of these several legislatures was to completely emancipate married women from unconstitutional bonds. CF. Dissent of Judges Harlan, Holmes and Hughes in Thompson vs. Thompson, 218 U.S. 611 (1910).

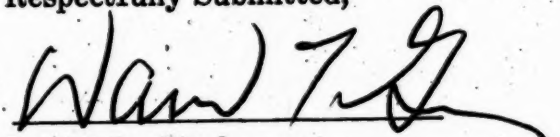
Even assuming, arguendo, that the interspousal immunity doctrine is founded on a rational basis, no rational basis can exist for a state's denial of a cause of action after the marital relationship has lost its character. The interspousal immunity doctrine as applied to the Petition-

er is unconstitutional, in violation of the Fourteenth Amendment.

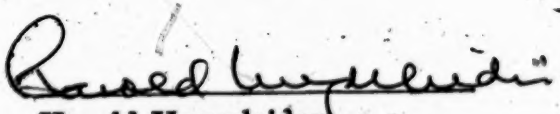
CONCLUSION

For the foregoing reasons, this Petition for a writ of certiorari should be granted.

Respectfully Submitted,



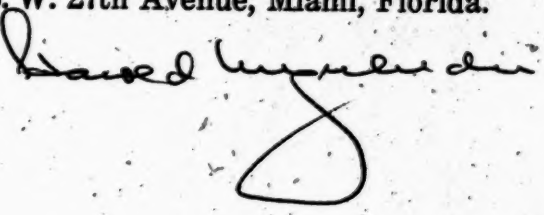
Daniel L. Ginsberg



Harold Ungerleider
of Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition for a Writ of Certiorari to the Supreme Court of Florida was served this 22 day of August, 1967, by depositing a copy of the same in the United States mail with sufficient postage pre-paid to Pallot, Silver, Pallot, Stern & Proby, Attorneys for the Respondent, Will C. Bencomo, at 627 S. W. 27th Avenue, Miami, Florida.



IN THE

SUPREME COURT OF THE UNITED STATES

No. ———

CARMEN BENCOMO,

Petitioner,

vs.

WILL C. BENCOMO,

Respondent

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

APPENDIX A

IN THE SUPREME COURT OF FLORIDA
JANUARY TERM, A. D. 1967
CASE NO. 35,678

CARMELA BENCOMO, a/k/a CARMEN BENCOMO,

Appellant,

vs.

WILLIAM C. BENCOMO,

Appellee.

Opinion filed May 31, 1967

An Appeal from the Circuit Court for Dade County, James W. Kehoe, Judge

Horton & Schwartz and Harold Ungerleider, for Appellant

Pallot, Silver, Pallot, Stern & Proby, for Appellee

ROBERTS, J.

This case brings for review a decision of the trial court dismissing a cause for action by the appellant-plaintiff against the appellee-defendant for an alleged intentional tort committed during coverture of marriage between the parties, the suit being filed after the marriage had been dissolved by divorce. The plaintiff contends that she has such a right to maintain the suit under Sections 1, 4 and 12 of the Declaration of Rights, Constitution of Florida, and under Section 1 of Article XI of the Constitution of Florida, and also under the Fifth and Fourteenth Amendments of the Constitution of the United States. The trial court construed such constitutional provisions in its final judgment, and this court has jurisdiction to review on direct appeal under Section 4(2), Article V, Constitution of Florida.

We are thus confronted with the question of whether or not a former spouse can maintain an action in tort against the other spouse for a tort allegedly committed during marriage, where such marriage has been dissolved by divorce. The trial court held she could not and dismissed the suit. We agree.

This court has long been committed to the proposition that one spouse can not sue the other because, under the common law, they are one person. See Corren v. Corren, Fla. 1950, 47 So.2d 774, in which this court said:—

> "The appellant regards Chapter 21932, supra, as having destroyed the 'unity of the marriage association' as it theretofore existed and reasons that if the wife may enter into agreements, as is provided in Section 2 of the act, and may 'sue and be sued', as is provided in Section 1, it follows that she, being empowered to sue her husband in case of a breach of their agreement, may also sue him for a tort committed upon her. But we cannot follow the appellant to this conclusion. 'Under the common law', we said in Taylor v. Dorsey, 155 Fla. 305, 19 So.2d 876, 880, 'the woman and the man became one person upon marriage, and that person was the husband. * * * This unity, or more accurately, merger, has been called the foundation for the rights, duties, and disabilities of marriage.'
>
> "We have not found in our examination of the legislative enactment any plain provision extending a married woman's rights to include a suit against her husband for tort. It seems to us that the trend toward giving a married woman more freedom has largely been with regard to her separate property and her dealings with persons other than her husband."

Continuing on Page 776:—

"Our opinion coincides with that of the Supreme Court of the United States expressed in Thompson v. Thompson, 218 U.S. 611, 31 S.Ct. 111, 112, 54 L.Ed. 1180, 30 L.R.A., N.S. 1153, 21 Ann. Cas. 921, that any change in the law so far-reaching and radical as to obliterate the common law unity 'should only be wrought [by the legislature] by language so clear and plain as to be unmistakable evidence of the legislative intention.' In that decision the court commented upon the effect upon public welfare and domestic harmony if each spouse were given the right to sue the other as if they were not married and then further observed: 'Had it been the legislative purpose not only to permit the wife to bring suits free from her husband's participation and control, but to bring actions against him also for injuries to person or property as though they were strangers, thus emphasizing and publishing differences which otherwise might not be serious, it would have been easy to have expressed that intent in terms of irresistible clearness.' * * *

"The legislature will assume grave responsibility when it enacts that each spouse may treat the other as a stranger so far as legal rights are concerned; and when it does so, the language proclaiming this revolutionary change should be positive and unambiguous.

"We are impelled to the conclusion that the

circuit judge was eminently correct when he held that the appellant could not and should not prevail in this case."

The decision in the Corren case is buttressed by the general rule announced in 41 C.J.S., Husband and Wife, Section 396, which says:—

"At common law neither spouse may maintain an action sounding in tort against the other. This rule applies to injuries both to person and to property. It is usually affirmed that the reason for, or basis of, the rule which denies the right of action is the common-law doctrine of the merger or unity of husband and wife, although a public policy which seeks to preserve or promote domestic peace and felicity has also been regarded as a reason for, or basis of, the rule.

"With specific reference to the wife's right of action, she cannot maintain an action against her husband for a personal tort in the absence of constitutional or statutory provision changing the common-law rule; as otherwise stated, in the absence of such a provision, she cannot maintain an action against him for an injury to her person or character. In accordance with such rule it has been held or recognized that the wife cannot maintain an action against her husband for assault and battery, for deliberately infecting her with a venereal disease, for an injury to her person resulting from his negligence, nor can the wife maintain an action against husband for false imprisonment, for malicious prosecution, for libel, or for slander."

In 27 Am. Jur., Husband and Wife, Section 589, it is also stated that:—

> "At common law, a tort committed by one spouse against the person or character of the other does not give rise to a cause of action in favor of the injured spouse. A divorce does not change this rule so as to enable a suit to be maintained after the obtaining of an absolute divorce."

Also in 27 Am. Jur., Husband and Wife, Section 594, there appears the following language:—

> "Where husband and wife are not liable to each other for torts committed by one against the other during coverture, they do not, upon being divorced, become liable to each other for torts committed prior to the divorce, by one spouse on the person or character of the other during coverture. . . The divorce cannot in itself create a cause of action in favor of the wife upon which she may sue, where it was not a cause of action before the divorce. * * *."

Also compare Amendola v. Amendola, Fla. App. 1960, 121 So.2d 805; and see 43 ALR 2nd 632.

In reaching this decision we have not overlooked the case of Alexander v. Alexander, 140 F. Supp. 925. In that case the United States District Court in another state undertook to construe and apply the Florida law on this subject and reached a decision opposite to the rule announced in this state in the cases herein cited. We have

no way of knowing why that court elected to depart from the rule previously announced in this state, but nevertheless we still adhere to our former decisions and reject the construction adopted by the South Carolina Federal court.

We have carefully measured the line of decisions on the question by this court against the constitutional guarantees invoked by the appellant and find no conflict. The trial judge was eminently correct in dismissing the bill, and the judgment here under review is

Affirmed.

THORNAL, C.J., THOMAS, DREW, O'CONNELL and CALDWELL, JJ., concur

ERVIN, J., dissents with Opinion

ERVIN, J., dissenting:

I think our decisional law should no longer support with pristine force the common law prohibition against actions between **former** husbands and wives for intentional torts committed by one upon the other during coverture, due to subsequent modifying provisions of our Federal and State constitutions and state laws. See: Section 2.01, F.S., which provides in part that the "common law [shall] be not inconsistent with the constitution and laws of the United States and the acts of this state." Section 4 of the Declaration of Rights of the Florida Constitution provides the state courts shall be open "so that every person for **any** injury done him in his . . . person or reputation shall have remedy, by due course of law. . ." (Emphasis added) Section 1, Amend. XIV, United States Constitution, provides in part " . . . nor shall any state

deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Aside from the language mechanics indicating a modification of the common law prohibition has occurred, the reasons stated in the decisional law of Florida supporting the common law rule have in large part now disappeared because of later overruling decisions interpreting individual rights guaranteed by organic law. In support of this proposition see Prosser on Torts, 3rd Ed. pp. 879, 883, as follows:

> "The courts which follow this majority view have buttressed their conclusion by inventing new arguments, not found in the early cases, for denying the remedy. Apart from stare decisis or judicial inertia, and the policy of strict construction of statutes changing the common law, it has been said that each spouse has remedy enough in the criminal and divorce laws—which obviously is untrue, since neither compensates for the damage done, or covers all the torts that may be committed. Stress has been laid upon the danger of fictitious and fraudulent claims, on the very dubious assumption that a wife's love for her husband is such that she is more likely to bring a false suit against him than a genuine one; and likewise the possibility of trivial actions for minor annoyances, which might well be taken care of by finding consent to all ordinary frictions of wedlock—or at least assumption of risk! The chief reason relied upon by all these courts, however, is that personal tort

actions between husband and wife would disrupt and destroy the peace and harmony of the home, which is against the policy of the law. This is on the bald theory that after a husband had beaten his wife, there is a state of peace and harmony left to be disturbed; and that if she is sufficiently injured or angry to sue him for it, she will be soothed and deterred from reprisals by denying her legal remedy—and this even though she has left him or divorced him for that very ground, and although the same courts refuse to find any disruption of domestic tranquillity if she sues him for a tort to her property, or brings a criminal prosecution against him. . . .

" . . . In some sixteen states one or more 'exceptions' have been recognized to the general rule of complete immunity between husband and wife, where for one reason or another the considerations of policy supposed to underlie it have been held not to apply. The entering wedge is recognition that there is a tort, but disability to sue for it; and that when the reasons for the disability fail, the tort becomes actionable. Thus recovery has been permitted for intentional physical attacks, on the ground that 'the peace and harmony of the home has been so damaged that there is no danger that it will be further impaired.' The same conclusion has been reached where the marriage has been terminated by separation, divorce, or annulment, or by the death of one or both spouses, whether the action is brought under a wrongful death act or a survival statute. . . .

"This is fully borne out by the fact that some nineteen jurisdictions, with the unanimous approval of legal writers, have followed the lead of a noted dissenting opinion of Mr. Justice Harlan, have rejected all arguments in justification of the immunity as specious, have thrown it completely overboard, and have construed the Married Women's Acts to authorize an action by either spouse for a personal tort committed by the other, whether it be intentional or negligent in character. . . . The number of such jurisdictions has been increasing in recent years; and this has been claimed to be due to the presence or availability of liability insurance in automobile cases. The devastating attack on the old rule in a number of recent decisions seems to leave no possible justification for it except that of historical survival."

The following cases support the foregoing quotes from Prosser: Denton v. Denton (1931), 223 Ala. 282, 135 So. 481; Harris v. Harris (1924), 211 Ala. 222, 100 So. 333; Johnson v. Johnson (1917), 201 Ala. 41, 77 So. 335, 6 A.L.R. 1031; Bennett v. Bennett (1932), 224 Ala. 335, 140 So. 378; Katzenberg v. Katzenberg, 183 Ark. 626, 37 S. W. 2d 696; Leach v. Leach (1957), 227 Ark. 599, 300 S. W. 2d 15; Rains v. Rains (1935), 97 Colo. 19, 46 P. 2d 740; Ginsberg v. Ginsberg, 126 Conn. 146, 9 A. 2d 812; Brown v. Brown (1914), 88 Conn. 42, 89 Atl. 889; Bushnell v. Bushnell (1925), 103 Conn. 583, 131 Atl. 432; Lorang v. Hays (1949), 69 Idaho 440, 209 P. 2d 733; Brown v. Gosser (Ky. 1953), 262 S. W. 2d 480; Combs v. Combs (Ky. 1953), 262 S. W. 2d 821; Gilman v. Gilman (1915), 78 N. H. 4, 95 Atl. 657; Lumbermen's Mut. Cas. Co. v.

Blake (1946), 94 N. H. 141, 47 A. 2d 874; Pridelle v. Farm Bureau Mut. Ins. Co. (N.H.), 119 A. 2d 97; Fitzmaurice v. Fitzmaurice, 62 N. D. 191, 242 N. W. 526; Damm v. Elyria Lodge No. 465 (1952), 158 Ohio St. 107, 107 N. E. 2d 337; Courtney v. Courtney (1938), 184 Okla. 305, 87 P. 2d 660; Fiedler v. Fiedler (1914), 42 Okla. 24, 140 P. 1042; Pardue v. Pardue (1932), 167 S. C. 129, 166 S. E. 101; Oschiek v. Oschiek, 224 S. C. 249, 136 S. E. 2d 393; Scotvold v. Scotvold (1941), 68 S. D. 53, 208 N. W. 266; Forbes v. Forbes (1938), 226 Wis. 225, 271 N. W. 112; Fontaine v. Fontaine (1931), 205 Wis. 570, 238 N. W. 40; Jaeger v. Jaeger (1952), 262 Wis. 14, 53 N. W. 2d 740; Cramer v. Cramer (1963), Alaska, 379 P. 2d 95.

In Harper and James on Torts, Vol. I, 1956, Sec. 8.10 on pages 645 and 646, the authors make the following observation:

> "The rule denying recovery has been applied literally and blindly in many cases where the reason for the rule could not possibly apply inasmuch as there was no home to disrupt and no domestic harmony to disturb. The divorce cases are typical examples. So, too, are cases in which the wife's administrator seeks to recover for her wrongful death. This rule has been applied even when the wife was murdered by her husband and where the wife's administrator sued the husband's administrator.
>
> "But a strong and probably increasing minority view permits the wife to sue her husband for such harms, especially if they are intended wrongs. A few liberal decisions have permitted

the action for the husband's negligence. This result seems eminently desirable. The metaphysical and practical reasons which prevented such actions at common law are no longer applicable. The danger to the family peace and tranquillity here, as in the case of suits by an infant against his parent, has been grossly overemphasized. Such policy and ordinary fairness commend the right of the wife to recover for tortious invasions of her interests in personality by her husband. While as much might be said to favor an action by the husband for a harm to his person by his wife, he did not have such an action at common law and no statutes purport to enlarge his rights against his wife. But the statutes under which a married woman is liable generally for her tort are not likely to be interpreted to make her immune to her husband, and liability on his part for bodily harm inflicted by him on her."

See also: Alexander v. Alexander (U.S.D.C. 1956), 140 F. Supp. 925; Gremillion v. Caffey (La.), 71 So. 2d 670; Amendola v. Amendola (Fla. App. 1960), 121 So. 2d 805; Steele v. Steele (D.D.C. 1946), 65 F. Supp. 329, and Apitz v. Dames, 1955, 205 Ore. 252, 287 P. 2d 585.

I think the decisional law of our state reflected in the majority opinion should yield to the extent that divorced husbands or wives may sue each other for unsettled, unsatisfied or unwaived intentional torts committed by one spouse upon the other during coverture. There is some justification for retaining the common law barrier so long as the marriage relation exists, but the rationale

of modern constitutional interpretations of individual rights would appear to override reasons for retaining the barrier after the marriage relation ceases. The reason the common law prohibition apparently should not be relaxed to permit tort actions during coverture between spouses is that while the marriage relation exists the presumption prevails that in conformity with marriage vows the spouse guilty of the tort will voluntarily make amends and be forgiven by the aggrieved spouse; but if not, then presumably the spouse aggrieved by the tort may obtain settlement or satisfaction from the offending spouse through divorce proceedings. Once, however, the marriage relation is severed by divorce and there was not or could not be a settlement or adjudication in the divorce proceedings of the claim of the aggrieved spouse for the intentional tort of the offending spouse, a tort action should be allowed the ex-spouse to recover damages for the intentional tort.

APPENDIX B

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA — IN AND FOR DADE COUNTY AT LAW

NO. 66L 550 — Judge James W. Kehoe

CARMELA BENCOMO, a/k/a CARMEN BENCOMO,
Plaintiff,

-vs-

WILLIAM C. BENCOMO,
Defendant.

ORDER OF DISMISSAL

THIS CAUSE CAME ON TO BE HEARD upon the Defendant's Motion to Dismiss the Plaintiff's Complaint, and upon argument of counsel for the respective parties relative to the right of the Plaintiff to maintain this suit, and whether the Plaintiff has such rights under § 1, § 4, and § 12, of the Declaration of Rights of the Constitution of the State of Florida, and F.S.A. § 708.09 and § 201, and under Article XI, § 1, of the Florida Constitution, and under the Fifth and Fourteenth Amendment to the Constitution of the United States; and the Court having construed such constitutional provisions and statutes, finds that they do not include the right of an ex-wife to sue her former husband for an intentional tort committed during coverture, and upon the foregoing construction, it is accordingly

ORDERED, ADJUDGED and DECREED that the Defendant's Motion to Dismiss the Plaintiff's Amended Complaint be and the same is hereby granted, and this cause is hereby dismissed with prejudice, and that the Defendant may go hence without day and his costs herein.

DONE and ORDERED in chambers at Miami, Dade County, Florida, this _____ day of July, 1966.

_____

CIRCUIT JUDGE

APPENDIX C

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

Amendment IV UNITED STATES CONSTITUTION

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or thing to be seized.

Amendment V UNITED STATES CONSTITUTION

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV UNITED STATES CONSTITUTION

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall

abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

FLORIDA CONSTITUTION — DECLARATION OF RIGHTS

Section I. All men are equal before the law, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring possessing and protecting property and pursuing happiness and obtaining safety.

FLORIDA CONSTITUTION — DECLARATION OF RIGHTS

Section 4. Courts to be open; remedies guaranteed

All courts in this State shall be open, so that every person for any injury done him in his lands, goods, person or reputation shall have remedy, by due course of law, and right and justice shall be administered without sale, denial or delay.

FLORIDA CONSTITUTION — DECLARATION OF RIGHTS

Section 12. Double jeopardy; compelling testimony; due process of law; eminent domain

No person shall be subject to be twice put in jeopardy for the same offence, nor compelled in any criminal case

to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken without just compensation.

FLORIDA STATUTES:

Sec. 708.08 Married women's rights; separate property

Every married woman is hereby empowered to take charge of, and manage and control her separate property, to contract and to be contracted with, to sue and be sued, and to, convey, transfer, mortgage, use and pledge her property, real and personal, and to make, execute and deliver instruments and documents of every character, without restraint, without the joinder or consent of her husband, in all respects as fully as if she were unmarried. Every married woman, without the joinder or consent of her husband shall have and may exercise all rights and powers with respect to her separate property, income and earnings, and may enter into, obligate herself to perform, and enforce contracts or undertakings to the same extent and in like manner as if she were unmarried; provided, however, that no deed, mortgage or other instrument conveying or encumbering real property owned by a married woman shall be valid without the joinder of her husband; provided, further, that any claim or judgment against any married woman shall not be a claim or lien against such married woman's inchoate right of dower in her husband's separate property. Laws 1943. c. 21932 Sec. 1.

Sec. 708.09 Same; agreements with husband, power of attorney, etc.

Every married woman may enter into agreements

and contracts with her husband, may become the partner of her husband or others, may give a power of attorney to her husband, and may execute powers conferred upon her by her husband, including the power to execute and acknowledge deeds to property owned by her or by herself and her husband as tenants by the entirety or by her husband. All powers of attorney heretofore executed by a wife to her husband and vice versa, and the execution of all documents executed thereunder, are hereby validated and confirmed. Laws 1943, c. 21696 Sec. 1; Laws 1943, c. 21932, Sec. 2.

Sec. 2.01 Common law and certain statutes declared in force

The common and statute laws of England which are of a general and not a local nature, with the exception hereinafter mentioned, down to the fourth day of July, 1776, are declared to be of force in this state; provided, the said statutes and common law be not inconsistent with the constitution and laws of the United States and the acts of the legislature of this state.

1 U.S.C. Sec. 1

In determining the meaning of any Act of Congress . . . words importing the masculine gender include the feminine as well; . . . the words person and whoever include . . . individuals.